

E-FILED on 2/10/10IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

12 WILFRED ROQUE

13 Plaintiff,

14 v. ORDER GRANTING MOTIONS TO
15 SUNTRUST MORTGAGE, INC., GMAC
16 MORTGAGE, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,
17 Defendants.No. C-09-00040 RMW
[Re Docket Nos. 57, 59]

19 Plaintiff Wilfred Roque ("Roque") originally filed this action in state court, and on January 7,
20 2009, defendant SunTrust Mortgage, Inc. ("SunTrust") removed on the basis of federal claims in the
21 original complaint. On January 20, 2009, Roque filed an amended complaint eliminating the federal
22 claims. Suntrust, GMAC Mortgage ("GMAC") and Mortgage Electronic Registration Systems, Inc.
23 ("MERS") each moved to dismiss and the court granted the motions to dismiss on April 17, 2009,
24 giving plaintiff leave to amend. Plaintiff filed a second amended complaint on May 7, 2009 and
25 Suntrust, GMAC, and MERS all filed motions to dismiss which the court granted on July 10, 2009,
26 giving plaintiff twenty days leave to file one last amended complaint. Plaintiff filed a third and final
27 amended complaint on September 13, 2009. Suntrust, GMAC and MERS all move again to dismiss.
28

ORDER GRANTING MOTIONS TO DISMISS
No. C-09-00040 RMW
AKT

1 The court has read the moving and responding papers and considered the arguments of counsel. For
 2 the reasons set forth below, the court grants defendants' motions to dismiss.

3 **I. BACKGROUND**

4 On August 2, 2006, Roque obtained a \$505,000 loan from SunTrust to refinance the existing
 5 loan on plaintiff's property at 2632 Baton Rouge Drive in San Jose, California ("the Property").
 6 Third Amended Complaint ¶¶ 1, 17 ("TAC"). The refinancing resulted in a deed of trust with Roque
 7 as borrower/trustor, SunTrust as original lender, and MERS as nominee for lender and lender's
 8 successors and assignors. TAC ¶¶ 2-6, Deed of Trust, Ex.A.

9 Roque alleges that defendants have engaged in and continue to engage in a pattern of
 10 "unlawful, fraudulent or unfair predatory real estate lending practices." TAC ¶16. Plaintiff alleges
 11 defendants engaged in the following list of predatory lending practices (a) failing to provide proper
 12 disclosures as required by law, (b) failing to disclose the true terms of the loan, (c) charging
 13 excessive closing costs and fees to plaintiff that have no reasonable relationship to the value of the
 14 services actually performed by defendants, and (d) failing and refusing to provide escrow final
 15 closing documents in the form and manner required in a valid closing statement. *Id.* Roque further
 16 claims no attempt was made by SunTrust to verify his income. *Id.* ¶ 18. If SunTrust had verified his
 17 income, Roque alleges, it would have realized that he would not have been able to make the
 18 mortgage payments. *Id.* Roque also asserts that subsequent to the loan closing, ownership over the
 19 promissory note and deed of trust changed and no clear chain of ownership exists. *Id.* ¶¶ 27-29.
 20 This unknown chain of ownership gives rise to plaintiff's allegations under the Pooling and
 21 Servicing Agreement dated December 1, 2006 ("PSA"). *Id.* ¶ 5, Ex. C. According to plaintiff, a
 22 PSA was entered into by, among others, Deutsche Bank National Trust Company ("Deutsche") as
 23 trustee, Greenwich Capital Acceptance, Inc. ("GCA"), as depositor and Greenwich Capital Financial
 24 Products, Inc. ("GCFP"), as seller, all of which Roque has added as defendants in the TAC. *Id.* The
 25 PSA, says plaintiff, is "a pool of securitized loans comprised of thousands . . . of notes and deeds of
 26 trust of other borrowers." *Id.* Roque asserts that SunTrust posed as a conventional mortgage lender
 27 but that SunTrust in fact had no financial stake (i.e. liability) in the transaction. *Id.* ¶¶ 19, 20.
 28 Further, Roque claims under the agreements entered into between SunTrust, GCA, GCFP and other

1 unnamed parties, SunTrust received a sum of money allegedly the amount of the loan plus a fee of
 2 around 2.5% or more. *Id.* ¶¶22-23. Plaintiff concludes that the security for the loan thus secured an
 3 obligation that had been paid in full by GCA or GCFP to SunTrust. *Id.*

4 Plaintiff does not allege that he made all required payments or that he is not in default under
 5 the terms of the loan.

6 Around July 18, 2008, a Notice of Default was recorded with the Santa Clara County
 7 Recorder's Office. *Id.* ¶26. On October 27, 2008, a Notice of Trustee's Sale was filed in the same
 8 office. *Id.*

9 Roque's TAC claims: (1) a declaratory judgment that defendants do not have the right to
 10 foreclose on the property; (2) wrongful foreclosure; (3) civil conspiracy; and (4) quiet title. TAC at
 11 9-25. GMAC and MERS have filed a motion to dismiss as to all claims. SunTrust has filed a
 12 separate motion to dismiss claims one, three and four, the claims in which it is a named defendant.

13 II. ANALYSIS

14 A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) tests the legal
 15 sufficiency of the claims in the complaint. To survive a motion to dismiss, a complaint must contain
 16 sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."
 17 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). A claim has facial plausibility when the plaintiff
 18 pleads factual content that allows the court to draw the reasonable inference that the defendant is
 19 liable for the misconduct alleged. *Id.* For the purposes of a motion to dismiss a court must take as
 20 true all of the factual allegations in the complaint, however, the court is not bound to accept as true
 21 legal conclusions couched as a factual allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
 22 556, 570 (2007).

23 In ruling on a 12(b)(6) motion, a court generally cannot consider material outside of the
 24 complaint. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). However, a court may consider
 25 evidence on which the complaint "necessarily relies" if: (1) the complaint refers to the document; (2)
 26 the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the
 27 document. *Id.* at 453-54. The court may treat such a document as "part of the complaint, and thus
 28 may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)."

1 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Therefore, this court accepts as true all
 2 material allegations in the complaint, the deed of trust and documents attached to the motion, as well
 3 as reasonable inferences to be drawn from them. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.
 4 1998).

5 **A. Declaratory Relief**

6 First, in Roque's cause of action for declaratory relief he seeks a declaration that defendants
 7 do not have a right to foreclose on the property. TAC ¶ 37. The basis of plaintiff's first argument
 8 is that defendants lack the right to foreclose under Article 3 of the Uniform Commercial Code. TAC
 9 ¶ 32. Plaintiff argues that to enforce a note the entity seeking enforcement must (1) be the holder of
 10 the note or (2) be able to prove the right to enforce the note. Cal. UCC § 3309. The court has
 11 rejected this claim. Plaintiff argues a second theory, that under California Civil Code § 2932.5,
 12 because the chain of ownership is unrecorded, the power of the sale in the deed of trust is no longer
 13 valid. *Id.* ¶ 35. These allegations do not sufficiently set forth a basis for declaratory relief against
 14 any defendant.

15 California law recognizes two distinct ways in which a loan may be secured by real property,
 16 either by a mortgage or by a deed of trust. *Yulaeva v. Greenpoint Mortg. Funding, Inc.*, 2009 WL
 17 2880393, 1 (E.D. Cal. Sept. 3, 2009). A deed of trust generally involves three parties, the
 18 borrower/trustor (in this case Roque) who conveys the right to sell the property to the trustee, for the
 19 benefit of the lender/beneficiary. *Id.* The practical effect is the creation of a lien on the subject
 20 property. *Id.* Notwithstanding that the right of sale is formally with the trustee, both the beneficiary
 21 and the trustee may commence the non-judicial foreclosure process. *Id.* (*citing* Cal. Code. Civ. Proc.
 22 § 725a).

23 Section 2932.5 applies to mortgages, not deeds of trust. It applies only to mortgages that
 24 give a power of sale to the creditor, not to deeds of trust which grant a power of sale to the trustee.
 25 Trustees regularly foreclose on behalf of assignees for the original beneficiary. *In re Golden Plan of*
 26 *Cal., Inc.*, 829 F.2d at 708-11. Accordingly plaintiff's theory under § 2932.5 fails. As the court
 27 previously concluded, non-judicial foreclosures are governed exclusively by Cal. Civ. Code Section
 28 2924-2924i. Docket No. 52 at 4.

1 Plaintiff's final attempt to state a claim for declaratory relief rests on the tenuous assertion
2 that the beneficiary of record of the deed of trust does not have standing to foreclose upon the
3 property because the PSA somehow cancelled the power of sale contained in the deed of trust due to
4 the unknown chain of ownership. TAC ¶¶ 30-37, 40-42. Uniformly among courts, production of the
5 note is not required to proceed in foreclosure and similarly no production of any chain of ownership
6 is required. *Putkkuri v. Recontrust Co.*, 2009 WL 32567, 2 (S.D. Cal., 2009). The TAC does not
7 establish an independent actual or present controversy as regards the PSA. Therefore, with no actual
8 controversy, the case is not subject to declaratory relief. A declaratory relief action "brings to the
9 present a litigable controversy, which otherwise might only be tried in the future." *Societe de*
10 *Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). Plaintiff's declaratory
11 relief claim is not substantiated. Accordingly, plaintiff's cause of action for declaratory relief fails to
12 state a claim and is dismissed with prejudice.

13 **B. Wrongful Foreclosure**

14 Plaintiff next raises a claim for wrongful foreclosure against only MERS, GMAC and
15 Deustche Bank. According to plaintiff, defendants Deustche Bank, MERS and GMAC were not the
16 proper parties to authorize, initiate and conduct the foreclosure sale. TAC ¶ 42. Plaintiff alleges
17 that the notice of default only provides contact information for MERS care of ETS Service, LLC.
18 TAC Ex. E. Plaintiff appears to be making an argument that because ETS is neither the mortgagee
19 or the beneficiary, plaintiff is being deprived of the right to know the beneficiary making the
20 foreclosure wrongful. *Id.* ¶ 43.

21 An analysis of wrongful foreclosure begins with the question of whether the notice of default
22 was defective. Section 2924 sets forth the requirements for notices of default, including that they
23 contain (a) a statement identifying the mortgage or deed of trust by stating the name or names of the
24 trustor or trustors and giving the book and page, or instrument number, if applicable, where the
25 mortgage or deed of trust is recorded or a description of the mortgaged or trust property; (b) a
26 statement that a breach of the obligation for which the mortgage or transfer in trust is security has
27 occurred; (c) a statement setting forth the nature of each breach actually known to the beneficiary;
28 and (4) his or her election to sell or cause to be sold the property to satisfy that obligation and any

1 other obligation secured by the deed of trust or mortgage that is in default. Cal. Civ. Code §
2 2924(a)(1)(A)-(C). The notice of default provides notice to plaintiff, along with the required
3 statement identifying the mortgage, stating the breach has occurred along with the nature of the
4 breach. TAC Ex. E. The declaration further provides a statement regarding the beneficiary's
5 election to sell or cause to be sold the property to satisfy the obligation. *Id.* The information
6 appears complete, and, plaintiff fails to allege facts showing that the notice of default was defective.

7 Plaintiff's allegations fail to specify the subsection of § 2924 that defendants allegedly
8 violated. Plaintiff makes the broad generalization that defendants violated section 2924 through
9 2924(k). TAC ¶ 39. Plaintiff raises the argument that no proper chain of assignment of the note can
10 be demonstrated and therefore the foreclosure is improper and fails to meet the requirements of
11 section 2924. *Id.* at ¶ 45. According to plaintiff, any substitution of trustee was null and void and
12 therefore the foreclosure proceedings were defective and wrongful. *Id.* at ¶ 46-48.

13 Under a claim for wrongful foreclosure, a plaintiff must allege a credible tender of the
14 amount of the secured debt to maintain any cause of action. *See Abdallah v. United Savings Bank*,
15 43 Cal. App. 4th 1101, 1109 (Ct. App. 1996). It is settled that an action to set aside a trustee's sale
16 for irregularities in sale, notice, or procedure should be accompanied by an offer to pay the full
17 amount of the debt for which the property was security. *Brittain v. IndyMac Bank, FSB*, 2009 WL
18 2997394, 1 (N.D. Cal. 2009). Sept. 16, 2009)(citing *Arnolds Management Corp. v. Eischen*, 158
19 Cal.App.3d 575, 578 (Ct.App.1984). However, plaintiff omits any offer from his pleadings.
20 Plaintiff makes no allegation of the ability to make such a tender or that such a tender has been
21 made.

22 Plaintiff's claim for wrongful foreclosure rests on his assertion that defendants wrongfully
23 conducted the foreclosure of the Property. However, "[a]n action for the tort of wrongful
24 foreclosure will lie [only] if the trustor or mortgagor can establish that at the time the power of sale
25 was exercised or the foreclosure occurred, no breach of condition or failure of performance existed
26 on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the
27 power of sale." *Collins v. Union Federal Sav. & Loan Ass'n*, 99 Nev. 284, 662 P.2d 610, 623 (Nev.
28 1983). However, plaintiff is unable to assert that no breach of performance occurred. Without such

1 an assertion plaintiff is unable to raise a wrongful foreclosure claim. *Id.* Therefore, plaintiff fails to
2 meet his burden in pleading a claim for wrongful foreclosure, and the presumption is that defendants
3 had a right to foreclose. *Ernestberg v. Mortgage Investors Group*, 2009 WL 160241, 6 (D.Nev.
4 2009).

5 Defendants GMAC and MERS also argue that the claim cannot apply to them because
6 neither were involved as the original lenders. GMAC was only a servicer and MERS only a former
7 beneficiary under the Deed of Trust. Mot. at 4. As discussed above, in a deed of trust, the
8 beneficiary has the right to instigate non-judicial foreclosure. It makes no difference that it may be
9 unclear who gave authority to record the Notice of Default. There appears to be no requirement
10 under section 2924 that the actual beneficiary step forward and be known. In the absence of any
11 legal requirement with respect to the procession of the original promissory note prior to a
12 nonjudicial foreclosure, plaintiff's theory for wrongful foreclosure is without merit. Therefore,
13 plaintiff's wrongful foreclosure claim is dismissed with prejudice.

14 **C. Civil Conspiracy and Fraud**

15 The required elements of a claim for civil conspiracy under California law are (1) the
16 formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy,
17 and (3) damages arising from the wrongful conduct. *3 Kidron v. Movie Acquisition Corp.*, 40 Cal.
18 App. 4th 1571, 1581 (1995).

19 Under California law, civil conspiracy, unlike criminal conspiracy, "is not an independent
20 tort." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-511 (2004). Civil
21 "conspiracy itself is not actionable without a wrong." *Okun v. Superior Court*, 29 Cal. 3d 442, 454
22 (1981); *see also Sebastian Intern., Inc. v. Russolillo*, 162 F. Supp. 2d 1198, 1207 (2001). In *Okun*,
23 the California Supreme Court dismissed a claim for civil conspiracy when the plaintiff failed to state
24 a claim for any underlying tort. *Okun*, 29 Cal. 3d at 454. None of plaintiff's causes of action in the
25 TAC states a valid tort claim. Because Roque's civil conspiracy allegations are only considered in
26 the context of Roque's tort claims, there is no separate and distinct tort cause of action for civil
27 conspiracy. *Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1228 (9th
28 Cir. 1997). Thus plaintiff's cause of action, for civil conspiracy fails.

1 Defendant SunTrust further argues Roque's claim for civil conspiracy fails to allege any facts
2 showing SunTrust participated in a conspiracy. SunTrust's Mot. at 8-9. Likewise, GMAC and
3 MERS raise attacks arguing that Roque's complaint alleging that defendants did "everything possible
4 to hide the true beneficiary" and "acted in concert pursuant to a plan" does not satisfy the specificity
5 required for a conspiracy pleading. GMAC's Mot. at 9-10.

6 Plaintiff generally pleads that defendants engaged in a "pattern of unlawful and fraudulent or
7 unfair predatory lending practices." TAC ¶ 16. In an attempt to remedy its deficient complaint,
8 plaintiff raises a specific claim for fraud in its opposition papers. Opp. to Mot. to Dismiss. In order
9 to state a claim for fraud, plaintiff must plead the following elements with specificity: (1) false
10 representation as to a material fact; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable
11 reliance and resulting damages. *Wilhelm v. Pray, Prince, Williams & Russell*, 186 Cal.App.3d 1324,
12 1332 (1986). Given the nature of a fraud claim as a serious attack upon a defendant's character, such
13 actions require a strict pleading standard and liberal construction will not be invoked to sustain a
14 pleading defective in any material respect. *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 73 (2d Dist.
15 1990). Under this standard, plaintiff's fraud claim fails to plead the particularity required by Rule
16 9(b). Rule 9(b) "requires the identification of the circumstances constituting fraud so that the
17 defendant can prepare an adequate answer from the allegations." *Odom v. Microsoft Corp.*, 486 F.3d
18 541, 553 (9th Cir. 2007). Plaintiff must include particularized allegations regarding the time, place,
19 and nature of the alleged fraudulent activities, "mere conclusory allegations of fraud are
20 insufficient." *In re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-48 (9th Cir. 1994). A
21 court may dismiss a claim grounded in fraud when its allegations fail to satisfy Rule 9(b)'s
22 heightened pleading requirements." *Vess v. Ciba-Geigy Corp, USA*, 317 F.3d 1097, 1107 (9th Cir.
23 2003). Here, plaintiff merely raises conclusory allegations and fails to include statements regarding
24 the place and nature of any of the defendants' purported fraudulent activities.

25 Rule 9(b) "does not allow a complaint to merely lump multiple defendants together but
26 require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and
27 inform each defendant separately of the allegations surrounding his alleged participation in the
28 fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007). In its opposition papers

1 plaintiff uses blanket assertions against all defendants. As defendants GMAC and MERS point out,
2 at some points the allegations only involve the loan transaction. TAC ¶ 53. GMAC and MERS
3 were never involved in the lending. Similarly, SunTrust argues that plaintiff's allegations at times
4 only involve the foreclosure in which SunTrust was not involved. Roque has not provided the detail
5 required to apprise defendants of the fraudulent conduct for which they each are charged. Given the
6 general nature of the allegations for this claim in both plaintiff's complaint and his opposition papers
7 it is difficult to attribute to specific defendants the fraud allegations. Accordingly, plaintiff's claim
8 for civil conspiracy is dismissed with prejudice.

9 **D. Quiet Title**

10 California courts apply the same tender rule to quiet title that applies in a wrongful
11 foreclosure action. *Lopez v. Chase Home Finance, LLC* 2009 WL 1120318, 3 (E.D.Cal. 2009). *See*
12 also *Karlsen v. Am. Sav. & Loan Ass'n*, 15 Cal. App. 3d 112, 117 (Cal Ct. App. 1971); *Arnolds*
13 *Mgmt. Corp. v. Eischen*, 158 Cal. App. 3d 575, 578 (Cal. Ct. App. 1984). The borrower must make
14 a valid and viable tender of payment of the secured debt as a precondition to challenging a
15 foreclosure sale. *Copsey v. Sacramento Bank*, 133 Cal. 659, 661-662 (Cal. 1901). "A valid and
16 viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale
17 under a deed of trust." *Karlsen* 15 Cal. App. 3d at 117. Here, plaintiff has not tendered payment nor
18 alleged an offer of tender of the full amount of the obligation owed on the mortgage. Moreover,
19 plaintiff has not alleged facts indicating that equitable circumstances exist such that tender should
20 not be required. *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 291, 119 P. 82 (1911).

21 California Code of Civil Procedure section 760.020 requires that a "verified" complaint for a
22 quiet title action include: (1) a legal description and street address of the subject real property; (2)
23 the title of plaintiff as to which determination is sought and the basis of the title; (3) the adverse
24 claims to the title of the plaintiff against which a determination is sought; (4) the date as of which
25 the determination is sought; and (5) a prayer for the determination of the title of the plaintiff against
26 the adverse claims. C.C.P. 761.020(a)-(d).

27 Plaintiff's quiet title claim is not adequately pled and merely duplicates facts alleged in the
28 second and third causes of action. Defendants GMAC and MERS argue that since neither holds any

1 interest in the property, given that all interest has been transferred to Deutsch Bank, they should not
2 be subject to this claim. GMAC's Mot. at 13. Plaintiff's cause of action for quiet title fails to plead a
3 legal description of the property, the basis of his title to the property, or the date as of which a
4 determination is sought. Plaintiff fails to sufficiently state a cause of action for any wrongful
5 conduct by defendants and has not alleged facts that, if true, would show that defendants do not have
6 the right to foreclose on his property.

7 **III. ORDER**

8 For the reasons stated above, the court grants the motions to dismiss as to all claims with
9 prejudice. Plaintiff has had ample opportunity to successfully plead a case and has not done so.

10
11 DATED: 2/9/10

Ronald M. Whyte
12 RONALD M. WHYTE
13 United States District Judge

1 **Notice of this document has been electronically sent to:**

2 **Counsel for Plaintiff:**

3 Reuben Lagbao Nocos rlnocos@nocoslaw.com

4 **Counsel for Defendants:**

5 Harold R. Jones hrj@severson.com
6 John B. Sullivan jbs@severson.com
7 Regina Jill McClendon , Esq. rjm@severson.com
8 Reuben Lagbao Nocos rlnocos@nocoslaw.com
9 Glenn Harlan Wechsler glenn@glennewachsler.com

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12 **Dated:** 2/10/10

13 CCL
14 **Chambers of Judge Whyte**